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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 654

THIDEE PRODUCTS, INC., *Petitioner,*

and

NATIONAL LABOR RELATIONS BOARD

v.

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, IN SUPPORT

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TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement of the case	3
Reasons for granting the writ	8
1. The decision below presents a question of law of great importance in the administration of the National Labor Relations Act, which should be decided by this Court	9
2. The difference in interpretations placed on *Porter* by judges and administrators should be settled by this Court	15
3. The interlocutory character of the order should not bar review at this stage because all parties are agreed that proceedings on remand prior to decision by this Court would serve no useful purpose	16
Conclusion	17

AUTHORITIES CITED

CASES:

American Construction Co. v. Jacksonville T. & K.W. Co., 148 U.S. 372 (1893) 16

Boys Market, Inc. v. Clerk's Union, 398 U.S. 235 (1970) 14

Consolo v. Federal Maritime Commission, 383 U.S. 607 (1966) 14

Ex-Cell-O Corp., 185 NLRB No. 20 (1970) 8, 9, 14, 16

Food Store Employees Union Local 347 v. NLRB, 74 LRRM 2109 (D.C. Cir. May 4, 1970) 13

Page

Hanover Shoe Inc. v. United Shoe Machinery Corp., 392 U.S. 431 (1968) 14

Hanover Star Milling Co. v. Metcalf, 240 U.S. 403 (1916) 17

NLRB v. American National Insurance Co., 343 U.S. 395 (1952) 13

Petrolane-Franklin Gas Service, Inc., 174 NLRB No. 88 (1969) 15

H. K. Porter Co. v. NLRB, 398 U.S. 99 (1970) 7, 8, 15

United States v. General Motors Corp., 323 U.S. 373 (1945) 17

STATUTES:

National Labor Relations Act, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, et seq. 2

Section 8(a)(5) 9, 10, 11, 12

Section 10(c) 2, 11, 13

CONGRESSIONAL MATERIAL:

Cox's Advisory Panel's report to the Senate Committee on Labor and Public Welfare (report pursuant to S. Res. 666 and S. Res. 141) 86th Cong., 2d Sess. 81 (1970) 10

Hearings on Congressional Oversight of Administrative Agencies (NLRB) before the Subcommittee on Separation of Power of the Senate Committee on the Judiciary, 90th Cong., 2d Sess., Part 1, 1968, p. 204 10

Report on Administration of the LMRA by the NLRB, Subcommittee on NLRB of House Committee on Education and Labor, 87th Cong., 1st Sess, (Comm. Print, 1961) p. 2 11

Report of the Special Subcommittee on Labor, Committee on Education and Labor, House of Representatives, 90th Cong., 2d Sess. (Comm. Print, 1968) p. 2 .....10, 11

Page

MISCELLANEOUS:

Derek Bok, The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act, 78 Harv. Law Rev. 38 (1964) .. 13

National Labor Relations Board, Annual Reports 12

Note, An Assessment of the Proposed "Make-Whole" Remedy in Refusal-to-Bargain Cases, 67 Mich. L. Rev. 374 (1968) 13

Note, A Survey of Labor Remedies, 54 Va. L. Rev. 38, 67 (1968) 13

Note, The Need for Creative Orders Under Section 10(c) of the National Labor Relations Act, 112 U. Pa. L. Rev. 69, 83 (1963) 13

Philip Ross, The Labor Law in Action: An Analysis of the Administrative Process Under the Taft-Hartley Act, 1966 Labor Relations Yearbook 299 (BNA) 13

The Government as a Source of Union Power (Brown University Press, 1965) p. 259 13

Theodore J. St. Antoine, A Touchstone for Labor Board Remedies, 14 Wayne L. Rev. 1039 (1968) .. 13

Stephen I. Schlossberg and John Silard, The Need for a Compensatory Remedy in Refusal-to-Bargain Cases, 14 Wayne L. Rev. 1059 (1968) 13

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BRIEF FOR RESPONDENT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, IN SUPPORT

Respondent, International Union of Electrical, Radio and Machine Workers, AFL-CIO, joins petitioner in praying that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on May 18, 1970.

OPINIONS BELOW

The opinions in the court below are reported at 426 F.2d 1243 and printed in Appendix B to the petition, pp. 46a-69a. The decision and order of the National Labor Relations Board is reported at 174 NLRB No. 103 and is printed in Appendix B to the petition, pp. 2a-45a.

JURISDICTION

The judgment of the court of appeals was entered on May 18, 1970 (App. B, p. 70a).[1] Rehearing was denied on July 10, 1970 (App. B, p. 72a). The motion for leave to file a second petition for rehearing was denied on September 21, 1970 (Supplement to Petition for a Writ of Certiorari, p. 9). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the National Labor Relations Board has the power to order an employer to make whole either employees or their union, or both, for losses suffered as the result of the employer's conceded refusal to bargain collectively after the union was certified in a Board conducted election, where the Board found that the employer engaged in this and numerous other flagrant unfair practices because of an attitude of hostility to the very basic purposes of the National Labor Relations Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (64 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq*) are printed in Appendix A to the petition. The Board's power to remedy unfair labor practices is granted by the following language in Section 10(c):

> "If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then

[1] "App. B" refers to Appendix B to the petition for a writ of certiorari.

the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act."

STATEMENT OF THE CASE

The petitioner, Tiidee Products, Inc., hereinafter called the Employer, is an Ohio corporation engaged in the manufacture of metal and plastics parts for mobile homes and travel trailers, with its plant and principal place of business in Dayton, Ohio (App. B, p. 6a). The respondent, International Union of Electrical, Radio and Machine Workers, AFL-CIO, hereinafter called the Union, made an unsuccessful attempt to organize the plant in 1964, which resulted in the filing of unfair labor practice charges and the issuance of a complaint by a General Counsel (App. B, p. 32a, fn. 27). The employees remained unorganized until July 1967, when the Union engaged in a successful organizational campaign and won an election conducted by the National Labor Relations Board on September 14, 1967, by a vote of 19 for the Union, 6 against and 3 challenged ballots (App. B, p. 8a). Certification of the Union issued on November 8, 1967 (G.C.Ex. 1(11), App. 518).[2]

In the usual proceedings on charge, complaint, hearing and order of the Board, followed by review and enforcement proceedings in the United States Court of Appeals for the District of Columbia Circuit, the Board found, and the court of appeals upheld all of

[2] "App." not followed by A, B, or C refers to the printed appendix in the court below.

its findings (App. B. pp. 46a-50a), that the Employer engaged in the following unfair labor practices:

From the outset of the organizing drive the Employer's president, Hollander, openly expressed to employees his determination never to have a union in his plant, threatening that "if they got in, he would close the doors" (App. B, pp. 13a-14a, 17a-19a, 29a, 35a). President Hollander and other supervisors unlawfully interrogated employees to determine the identity of union adherents and the extent of union activity among employees (App. B, pp. 13a-14a, 16a-18a, 29a, 30a, 35a) and sought to induce employees to act as informers concerning the union activities of fellow employees (App. B, pp. 13a-14a, 17a-18a, 30a-31a, 35a). Under employer aegis employees were polled by a supervisory employee who asked each employee to sign a petition with a yes or no after his name indicating whether or not he or she wanted an election to determine if a union should be chosen as his or her representative (App. B, pp. 15a-17a, 30a, 35a).

Following the certification of the Union the Employer not only refused even to meet with the Union (App. B, pp. 9a, 11a-12a, 36a) or to furnish it requested information as to the employees' existing wages and frringe benefits (App. B, pp. 9a, 12a, 36a) but also engaged in a campaign of eliminating union supporters from the plant by discharging two and laying off others solely because the Union won the election (App. B, pp. 19a-26a, 31a-34a, 35a). The Employer in retaliation against employees for selecting the Union, also arbitrarily increased production quotas of employees, thereby discriminating against them in order to discourage membership in the Union (App. B, pp. 25a, 32a, 35a-36a).

While the Employer purported at the time it refused the Union's initial request for bargaining to base its refusal on its desire to litigate the validity of the certification of the Union (App. B, pp. 15a-16a), both the Board (App. B, pp. 10a-11a) and the Court (App. b, p. 51) found that the Company's objections to the election were "patently frivolous and violated the express terms of the Agreement for Consent Election, entered into with the Union only thirteen days before the election, to abide by the decision of the regional director" (App. B, pp. 51a-52a). Neither before the Board nor in the court did the Company ever give "a hint of support or explanation for its claim that the regional director acted 'arbitrarily and capriciously'" (App. B, p. 52a). The Board found that the Employer's refusal to bargain pending litigation evidenced that the "Employer is seeking to avoid the obligations imposed by statute" (App. B, p. 12a), "evinces a complete rejection of the collective bargaining principle" (App. B, p. 37a) and "manifested an attitude of hostility directed toward the very basic purposes of the Act." (App. B, p. 39a).

In the court below the Employer made no effort in either its brief or oral argument to justify its refusal and indeed conceded both its "clear antiunion animus" from the "very beginning" of the organizational drive and its unlawful refusal to bargain collectively (App. B, pp. 46a-47a, cf. Pet. p. 3, fn. 1). The court characterized the position of the Company as "palpably without merit with respect to its refusal to bargain" (App. B, p. 54a), as "a clear and flagrant violation of the law" (App. B, p. 51a), "a brazen refusal to bargain, in violation of solemn obligations" (App. B, p. 53a), "a manifestly unjustifiable refusal to bargain" and "abuses like those before us" (App. B, p. 56a).

The Union, at the hearing before the Trial Examiner (App. B, pp. 37a-38a), in its exceptions to the Trial Examiner's decision and in the court below (App. B, pp. 47a, 52a, 57a, 63a-64a) sought an order requiring the Employer to remedy its refusal to bargain by making whole the employees and the Union for losses suffered as a result of such refusal (App. B, pp. 37a-38a, 57a, 59a-60a, 62a, fn. 15). The Trial Examiner "allowed the Union to develop fully in the record all evidence necessary to sustain its position in this issue" but declined to grant the requested remedy because it involved "both legal and policy questions which should be initially considered by the Board" (App. B, p. 38a). Accordingly the Trial Examiner recommended only the conventional prospective type order respecting the refusal to bargain, namely to cease and desist from refusing to bargain and upon request bargain collectively with the Union (App. B, pp. 39a-41a).

The Board in its short decision in which it adopted the findings, conclusions and recommendations of the Trial Examiner (App. B, pp. 2a-4a), made no mention of the fact that the Union sought any additional remedy.

In a carefully reasoned opinion the court of appeals held that the purely prospective type of order, "assuming" its "general validity", in a case of "brazen refusal to bargain, in violation of solemn obligations", "operates in a real sense so as to be counterproductive, and actually to reward an employer's refusal to bargain during the critical period following a union's organization of his plant" (App. B, p. 53a). The court held that a prospective-only order did not further labor policy because it enabled an employer to reap two fold benefits from his refusal to bargain: during the period before the enforcement of the Board's order the em-

ployer get what he considers the economic benefit of the refusal to bargain (App. B, p. 53a); when the employer is ordered to bargain with the union some years later, "the employer may reap a second benefit from his original refusal to comply with the law: he may continue to enjoy lower labor expenses after the order to bargain either because the union is gone or because it is too weak to bargain effectively" (App. B, p. 54a).

The court below detailed the injuries imposed by a purely prospective type order on employees, the union, other employers who bargain in good faith and suffer an economic disadvantage (App. B, pp. 56a, 57a-58a), the Board and the courts whose administrative and judicial resources are drained and diverted by encouraging "frivolous litigation" (App. B, pp. 54a-55a).

Analyzing pertinent statutory language and precedents in this and other courts, the court below held that the Board had the power to order a make-whole remedy for the refusal to bargain in this case (App. B, pp. 56a-62a). The court below found nothing in this Court's decision in *H. K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970) which impinged on the power of the Board to give the make-whole remedy which the court ordered the Board to consider. In this respect the court below stated (App. B, p. 61a):

> "We in no way suggest either that the Board can compel agreement or that the make-whole remedy is appropriate under circumstances in which the parties would have been unable to reach agreement by themselves. Quite the contrary, we have specifically limited the scope of our remand first, to consideration of past damages, not to compulsion of a future contract term, and second, to relate to damages based upon a determination of what the parties themselves would have agreed to if they had

engaged in the kind of bargaining process required by the Act. It is not within the scope of our remand for the Board to measure the amount of damages by reference to any contract term which could have been brought about only through a mandate to the employer not merely to engage in the process of collective bargaining but also to agree on a contract provision."

The court below accordingly enforced in full the order entered by the Board and at the same time remanded the Union's request for additional relief to the Board for further proceedings consistent with the court's opinion (App. B, pp. 62a, 70a). Judge MacKinnon concurred in the enforcement of the Board's order but dissented from the remand because he read this Court's decision in *H. K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970) as foreclosing the issue of the Board's power to grant the requested make-whole remedy (App. B, pp. 63a-69a).

REASONS FOR GRANTING THE WRIT

In our view, the decision of the court below is in every respect correct and, if certiorari is granted, we will seek an affirmance on the precise grounds set forth in the opinion below. We join in urging the grant of a writ of certiorari only because the National Labor Relations Board, in a three to two decision in *Ex-Cell-O Corp.*, 185 NLRB No. 20 (decision and order of the Board printed in full in Appendix C to the petition, pp. 79a-120a) issued on August 29, 1970, subsequent to the decision and judgment below, and in express disagreement with the holding of the court below in this case, held that the Board does not have the power which the court below held that the Board had and which the court had directed the Board to exercise on the remand of this case.

1. The Decision Below Presents a Question of Law of Great Importance in the Administration of the National Labor Relations Act, Which Should Be Decided by This Court

All the members of the National Labor Relations Board, including its present chairman, as well as the predecessor chairman of the Board, are agreed that if the Board does not have the power to grant a make-whole remedy, the Board lacks any effective means of enforcing Section 8(a)(5) of the Act. In the *Ex-Cell-O* decision, Chairman Miller, joining with Board Members Fanning and Jenkins, who constitute a majority of the present Board, stated (App. C, p. 83a):

> "We have given most serious consideration to the Trial Examiner's recommended financial reparations Order, and are in complete agreement with his finding that current remedies of the Board designed to cure violations of Section 8(a)(5) are inadequate. A mere affirmative order that an employer bargain upon request does not eradicate the effects of an unlawful delay of 2 or more years in the fulfillment of a statutory bargaining obligation. It does not put the employees in the position of bargaining strength they would have enjoyed if their employer had immediately recognized and bargained with their chosen representative. It does not dissolve the inevitable employee frustration or protect the Union from a loss of employee support attributable to such delay. The inadequacy of the remedy is all the more egregious where, as in the recent *N.L.R.B.* v. *Tiidee Products, Inc.*, case, the court found that the employer had raised 'frivolous' issues in order to postpone or avoid its lawful obligation to bargain." (Footnote omitted.)

The dissenting two members of the Board, predecessor Chairman McCulloch and Board Member Brown, dissenting in *Ex-Cell-O*, in urging that the Board did have the power to give a make-whole remedy which the

majority recognized was essential to make Section 8 (a)(5) effective, pointed to the widespread recognition in the courts, Congress and academic circles, of the inadequacy of the remedies which the Board has traditionally used. The dissent stated (App. C, pp. 104a-106a):

> "The present remedies for unlawful refusals to bargain often fall short, as in the present case, of adequately protecting the employees' right to bargain. Recent court decisions, congressional investigations, and scholarly studies have concluded that, in the present remedial framework, justice delayed is often justice denied.
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> * * *
>
> "A study by Professor Philip Ross shows that a contract is signed in most situations where the employer honors its duty to bargain without delay, but that the chance of a contract being signed is cut in half if the case must go to court enforcement of a bargaining order. In the interim, of course, the employees are deprived of their rightful union representation and the opportunity to bargain over their terms and conditions of employment, while at the same time their employers may gain a monetary advantage over their competitors who have complied with their legal duty." (Footnotes omitted)

The dissent cited (App. C, p. 104a, fn. 45) the Cox Advisory Panel's report to the Senate Committee on Labor and Public Welfare[3] and testimony given at the hearings before the Special Subcommittee on Labor in 1968.[4] In addition it could have cited the Report of

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[3] Report pursuant to S. Res. 66 and S. Res. 141, 86th Cong., 2d Sess. 81 (1960).

[4] See testimony of Mozart G. Ratner during Hearings on Congressional Oversight of Administrative Agencies (NLRB) before the Subcommittee on Separation of Power of the Senate Committee in the Judiciary, 90th Cong., 2d Sess. Part 1, 1968, pp. 204, 214.

the Special Subcommittee on Labor, Committee on Education and Labor, House of Representatives, 90th Cong., 2d Sess. (Comm. Print. p. 2) which stated:

> "Employers who violate the law are encouraged to do so as the penalties come too late for effective enforcement, and in any event have little or no deterrent force."

Similarly the Subcommittee on NLRB of the House Committee on Education and Labor, 87th Cong., 1st Sess., Report on Administration of the LMRA by the NLRB (Comm. Print., p. 2, 1961) stated:

> "A partial reason for the caseload, and hence the delay in unfair labor practice cases, lies in the inadequate remedies of the Labor Board. Labor Board orders constitute in many situations no more than a 'slap on the wrist'. They are too little and too late. They constitute, in the words of one witness, 'a license fee for union busting'. The subcommittee recommends that the Labor Board reconsider the problem of 'remedies' with an eye to taking the profit out of unfair labor practices."

The caseload to which the above quoted subcommittee report refers has increased, with respect to refusal to bargain cases, three-fold since the date of the report. Indeed the history of the increase in refusal to bargain cases before the Board during the past 15 years is the most startling evidence of the ineffectiveness of present remedies. In the fiscal year 1955-1956 there were 838 charges under Section 8(a)(5). The number doubled by 1959-1960, trebled by 1962-1963, quadrupled by 1964-1965 and almost quintupled by 1968-1969 when the figure rose to 4,097. The increase in orders to employers to bargain was even more striking. The 23 in 1956-1957, doubled by 1958-1959, increased tenfold by 1964-

1965 and fifteen fold by 1966-1967, when 366 orders to employers to bargain were issued.[5]

[5] The following table is based on figures in the NLRB's Annual Reports. Page references in parenthesis are to the Annual Report issued by the NLRB for the year indicated in column 1, except that the figures without any parenthesis after them are taken from the NLRB 12th Annual Report for the fiscal year ended June 30, 1947:

Fiscal Year	No. of charges alleging 8(a)(5)	No. of Decisions finding 8(a)(5)	No. of Cases closed by collective bargaining begun by employer
1935-1936	405 (p. 34)		
1936-1937	1,291 (p. 19)		
1937-1938	2,576 (p. 28)		
1938-1939	1,776 (p. 31)		923
1939-1940	1,233 (p. 15)		881
1940-1941	1,593 (p. 25)		1,009 (p. 36)
1941-1942	1,550 (p. 77)		1,032 (p. 87)
1942-1943	756 (p. 85)		493 (p. 94)
1943-1944	465 (p. 79)		136
1944-1945	507 (p. 81)		116 (p. 85)
1945-1946	1,241 (p. 76)		176 (p. 81)
1946-1947	1,347 (p. 68)		273 (p. 88)
1947-1948	789 (p. 99)		173 (p. 106)
1948-1949	1,070 (p. 159)		228 (p. 166)
1949-1950	1,309 (p. 222)		236 (p. 229)
1950-1951	1,235 (p. 294)		261 (p. 295)
1951-1952	1,226 (p. 281)		197 (p. 282)
1952-1953	1,347 (p. 95)		247 (p. 96)
1953-1954	1,212 (p. 157)		230 (p. 158)
1954-1955	1,213 (p. 161)	65 (p. 5)	135 (p. 162)
1955-1956	838 (p. 165)	54 (p. 2)	117 (p. 166)
1956-1957	827 (p. 163)	23 (p. 3)	91 (p. 164)
1957-1958	1,039 (p. 145)	26 (p. 3)	39 (p. 146)
1958-1959	1,311 (p. 163)	55 (p. 3)	49 (p. 164)
1959-1960	1,753 (p. 180)	53 (p. 12)	269 (p. 181)
1960-1961	1,676 (p. 220)	67 (p. 17)	319 (p. 221)
1961-1962	2,294 (p. 262)	157 (p. 18)	432 (p. 263)
1962-1963	2,584 (p. 164)	165 (p. 21)	548 (p. 165)
1963-1964	3,088 (p. 170)	175 (p. 23)	986 (p. 173)
1964-1965	3,815 (p. 180)	226 (p. 21)	1,022 (p. 183)
1965-1966	3,811 (p. 186)	326 (p. 23)	1,103 (p. 190)
1966-1967	3,819 (p. 218)	366 (p. 15	1,282 (p. 222)
1967-1968	4,097 (p. 203)	332 (p. 15)	1,371 (p. 206)

The problem of the ineffectiveness of the prospective-type order in refusal to bargain cases has received extensive notice in studies of administration of the National Labor Relations Act[6] and the legal publications.[7] The court below has, in addition to its extensive statement in the instant case of the inadequacies of the Board's usual type of orders in collective bargaining cases (App. B, pp. 52a-57a), remanded in other cases because of such inadequacy. In *Food Store Employees Union Local 347* v. *NLRB*, 74 LRRM 2109 (D.C. Cir. May 4, 1970) the court below remanded for consideration of its remedy in the light of its decision in the instant case. Harvard Law School's Dean Derek Bok has indicated that continued scoffing at labor law because of the inadequacy of its remedies will cause the law to lose its "moral authority" and "the most serious consequences" will follow.[8]

Enforcement of the obligation to bargain collectively is crucial to the statutory scheme. *NLRB* v. *American*

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[6] Philip Ross, The Labor Law in Action: An Analysis of the Administrative Process under the Taft-Hartley Act, 1966 Labor Relations Yearbook 299, 302-303 (BNA); Philip Ross, The Government as a Source of Union Power (Brown University Press, 1965) p. 259.

[7] Stephen I. Schlossberg and John Silard, The Need for a Compensatory Remedy in Refusal-to-Bargain Cases, 14 Wayne L. Rev. 1059 (1968); Theodore J. St. Antoine, A Touchstone for Labor Board Remedies, 14 Wayne L. Rev. 1039 (1968); Note, An Assessment of the Proposed "Make-Whole" Remedy in Refusal-to-Bargain Cases, 67 Mich. L. Rev. 374, 378 (1968); Note, A Survey of Labor Remedies, 54 Va. L. Rev. 38, 67 (1968); Note, The Need for Creative Orders under Section 10(c) of the National Labor Relations Act, 112 U. Pa. L. Rev. 69, 83-88 (1963).

[8] Derek Bok, The Regulation of Campaign Tactics in Representation Elections under the National Labor Relations Act, 78 Harv. Law Rev. 38, 59 (1964).

National Insurance Co., 343 U.S. 395, 402 (1952). Indeed it underlies our entire national policy. *Boys Market, Inc.* v. *Clerk's Union*, 398 U.S. 235, 251 (1970).

While the majority of the National Labor Relations Board in the *Ex-Cell-O* case, suggested that the remedy be sought in Congress (App. C., p. 89a), we submit that in an issue of such critical importance this Court should first pass on the question so that it will be clear whether Congressional action is necessary. In other fields this Court has not been hesitant to take cases involving an issue as to whether a statute of Congress provided an effective remedy and has gone far to construe statutory language to prevent a Congressional policy from aborting for want of an effective remedy. In *Hanover Shoe Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 431, 494 (1968), fearing that treble-damage actions would be "substantially reduced in effectiveness", this Court construed statutory language requiring the plaintiff to have been "injured in his business or property" as satisfied even though the plaintiff passed on all the loss for otherwise "those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who could bring suit against them." Here, as the court below pointed out, we have injured employees whose loss coincides with the fruits of illegality retained by the employer (App. B, pp. 53a-54a). Similarly, in *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, 624-625 (1966) this Court held "expected profits" could be recovered for the period during which the wrongdoer litigated.

2. The Difference in Interpretations Placed on Porter by Judges and Administrators Should Be Settled by This Court

The majority of the court below, we believe correctly, found nothing in this Court's decision in the *Porter*[9] case which suggested that a make-whole remedy was not within the Board's powers in a case such as the instant one (App. B, p. 61a). Judge MacKinnon, dissenting below, read *Porter* as precluding such a remedy (App. B, pp. 65a-66a, 68a). A majority of the Board members read *Porter* as Judge MacKinnon does (App. C, pp. 87a-88a). The minority of the Board read *Porter* as the majority of the court below does (App. C, pp. 109-110 and fn. 55).

That it is this Court's decision in *Porter* which has caused the difficulty, over the matter of the Board's power to issue a make-whole remedy in an initial refusal to bargain case appears to be confirmed by the fact that prior to *Porter* the Board had, at least on one occasion, granted such a make whole remedy. *Petrolane-Franklin Gas Service, Inc.*, 174 NLRB No. 88 (1969).[10]

This uncertainty as to the meaning of the *Porter* decision requires clarification which can only come authoritatively from this Court. The present case presents an excellent vehicle for such clarification.

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[9] *H. K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970).

[10] There the Board adopted the Trial Examiner's decision which as a remedy for an initial refusal to bargain, required the employer to put into effect retroactively pay and salary increases granted at other of the employer's plants.

3. The Interlocutory Character of the Order Should Not Bar Review at This Stage Because All Parties Are Agreed That Proceedings on Remand Prior to Decision by this Court Would Serve No Useful Purpose

At the time when the Union moved in the court below for a remand and the court granted the remand, neither the Union nor the court was aware that the Board would deem itself to be lacking in the statutory power to grant a make-whole remedy. The court below has thus ordered the Board to exercise a power which the Board disclaims.

It is theoretically possible for the Board to take the remand and proceed to devise a make-whole order on the assumption that it has the power to do so. However, devising a make-whole remedy involves the exercise of discretion in an area where a wide variety of possible solutions must be considered and resolved through administrative ingenuity of the highest order. The dissent in *Ex-Cell-O* suggests a few of the possibilities. (App. C, pp. 115a-118a).

The pursuit of the remand, prior to the time that this Court decides the Board's power, will saddle the parties with an order reflecting a dubious exercise of discretion because based on theoretical administration rather than genuine administration, if the power is ultimately held present, or result in useless delay and expense, if the power is ultimately held lacking.

This case, therefore falls within the rule that review of a nonfinal decree will be granted where "necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause". *American Construction Co. v. Jacksonville, T. & K.W. Co.*, 148 U.S. 372, 384 (1893). The petition for a writ of certiorari presents an important and clear cut issue of law that is

fundamental to the future course of the case. This Court has on occasion departed from its usual reluctance to review interlocutory matters where the issue, of such importance as to require review here, was one fundamental to the future conduct of the case. *United States* v. *General Motors Corp.*, 323 U.S. 373, 377 (1945); *Hanover Star Milling Co.* v. *Metcalf*, 240 U.S. 403, 408-409 (1916).

CONCLUSION

For the foregoing reasons it is urged that the petition for a writ of certiorari be granted.

Respectfully submitted,

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